

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In The Matter of The Applications of)	
)	
Golden Triangle Radio, Inc.)	
(Assignor))	File Nos. BAL/BALH-19980922EA-EC
and)	
Cumulus Licensing Corp.)	
(Assignee))	
)	
For Consent to the Assignment of the Licenses of)	
WKOR(FM), Columbus, MS, WMXU(FM) and)	
WSSO(AM), Starkville, MS)	
)	
And)	
)	
Charisma Broadcasting Co.)	
(Assignor))	File No. BAL-19980922EK
and)	
Cumulus Licensing Corp.)	
(Assignee))	
)	
For Consent to the Assignment of the License of)	
WKOR(AM), Starkville, MS)	
)	
And)	
)	
Bravo Communications, Inc.)	
(Assignor))	File No. BALH-19980922ED
and)	
Cumulus Licensing Corp.)	
(Assignee))	
)	
For Consent to the Assignment of the License of)	
WSMS(FM), Artesia, MS)	
)	
And)	
)	
Radio Columbus, Inc.)	
(Assignor))	File Nos. BAL/BALH-19981028EC-ED
and)	
Cumulus Licensing Corp.)	
(Assignee))	
)	
For Consent to the Assignment of the Licenses of)	
WJWF(AM) and WMBC(FM) Columbus, MS)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2002

Released: March 19, 2002

By the Commission: Chairman Powell and Commissioners Abernathy and Martin issuing separate statements; Commissioner Copps dissenting and issuing a statement.

1. The Commission has before it the above-captioned applications for the assignment of the licenses for stations WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM), Starkville, MS from Golden Triangle Radio, Inc.; WKOR(AM), Starkville, MS from Charisma Broadcasting Co.; WSMS(FM), Artesia, MS from Bravo Communications Inc.; and WJWF(AM) and WMBC(FM), Columbus, MS from Radio Columbus, Inc. ("Radio Columbus") to Cumulus Licensing Corp. ("Cumulus"). (File Nos. BAL/BALH-19980922EA-ED, EK and BAL/BALH-19981028EC-ED). Three of the four sellers, Golden Triangle Radio, Inc., Charisma Broadcasting Co., and Bravo Communications, Inc. are commonly owned by Donald R. DePriest (collectively, "DePriest").

2. Because these applications were pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we resolve the competitive concerns raised by these applications pursuant to the interim policy adopted in that notice.¹ As we discuss more fully below, permitting common operation and ownership of these stations will bring significant benefits to listeners, in particular, significantly increased locally-selected and locally-generated programming. Although having Cumulus commonly own these seven stations in the Columbus-Starkville area may carry some risk of anticompetitive harms, we conclude that the demonstrable benefits to the listening public from common control outweigh the risk of harm. Accordingly, we find that the public interest will be served by the assignment of the licenses at issue and we grant the applications.

I. INTRODUCTION

3. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.² In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996. Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

4. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."³ In August 1998, the Commission also began

¹ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001) ("*Local Radio Ownership NPRM*").

² See generally *id.* at 19862-70 ¶¶ 3-18.

³ *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXX, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

“flagging” public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission’s public interest concerns.⁴

5. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that “our current policies on local radio ownership [did] not adequately reflect current industry conditions” and had “led to unfortunate delays” in the processing of assignment and transfer applications.⁵ Accordingly, we adopted the *Local Radio Ownership NPRM* “to undertake a comprehensive examination of our rules and policies concerning local radio ownership” and to “develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.”⁶ In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

6. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”⁷ Although we recognized the need to “handle currently pending radio assignment and transfer applications and to address any future applications filed” while the *NPRM* is pending, we disavowed any intent to prejudge the “ultimate decision” in the rulemaking and rejected any “fundamental” changes to our current policy pending completion of the rulemaking.⁸

7. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.⁹ The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

II. BACKGROUND

8. Cumulus owns no stations in the Columbus-Starkville-West Point, Mississippi area. Cumulus currently operates the seven stations it seeks to purchase under Local Marketing Agreements (“LMAs”) and has done so for three years. At the time Cumulus filed the above-captioned applications, the stations were not located in an Arbitron metropolitan area. In the fall of 1999, Arbitron defined a Columbus-Starkville-West Point metropolitan area (“Columbus-Starkville metro”) and included all seven stations in its listings. Pursuant to Cumulus’s request, in the fall of 2001, Arbitron listed WSMS(FM) in the adjacent Tupelo, Mississippi metro rather than in the Columbus-Starkville metro. There are 14

⁴ See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

⁵ See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

⁶ *Id.*

⁷ *Id.* at 19894 ¶ 84.

⁸ *Id.*

⁹ *Id.* at 19895 ¶ 86.

commercial stations in the Columbus-Starkville metro and nine out-of-market stations (including WSMS(FM)) that receive a listening share in the Columbus-Starkville metro.¹⁰

9. T&W Communications Inc. (“T&W Communications”) filed petitions to deny each of the above-captioned applications, arguing that grant of the proposed transactions would cause undue concentration of control of radio advertising in the local radio market.¹¹ T&W Communications claims that the proposed transactions would unduly restrict competition and would enable Cumulus to exercise monopoly power over advertising rates. Cumulus filed a consolidated opposition contending the proposed transactions would improve service to listeners, result in better advertising products, and increase competition for radio and other media advertising.¹² DePriest filed a consolidated opposition arguing the market share Cumulus would control is consistent with other radio transactions found by the Commission to be in the public interest.¹³

10. On November 15, 2001, the staff sent the Applicants and the Petitioner a letter affording them an opportunity to update the record in light of the time that had passed since the applications were filed in 1999 and in light of the interim policy the Commission adopted regarding the processing of applications for the assignment and transfer of control of radio licenses.¹⁴ Both Cumulus and T&W Communications filed responses.¹⁵

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act of 1934, as amended (“the Communications Act”), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of DePriest’s and Radio Columbus’s radio broadcast licenses to Cumulus before those assignments may occur.¹⁶ We are making that finding in this case pursuant to the interim policy laid out in the recently issued *Local Radio Ownership NPRM*.¹⁷ Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of

¹⁰ “Out-of-market” stations refer to those stations identified by Arbitron as receiving a share of the listening audience in the Arbitron metro but that do not identify that metro as their home. “In-market” stations are those stations that are listed as being in the metro at issue.

¹¹ *Petition to Deny*, T&W Communications Corp. (filed Nov. 2, 1998); *Petition to Deny*, T&W Communications Corp. (filed Dec. 7, 1998).

¹² *Consolidated Opposition to Petitions to Deny*, Cumulus Licensing Corp. (filed June 28, 1999).

¹³ *Opposition to Petition to Deny*, Golden Triangle Radio, Inc., Charisma Broadcasting Co., Bravo Communications, Inc. (filed June 28, 1999).

¹⁴ Letter from Peter H. Doyle, Chief, Audio Service Division, Mass Media Bureau to William Freedman, Esq., Morrison & Foerster, LLP; James L. Winston, Esq., Rubin Winston Diercks Harris & Cooke, LLP; David Burns, Esq., Paul Hastings Janofsky & Walker, LLP; and Mr. J.W. Furr, Radio Columbus (Nov. 15, 2001).

¹⁵ Letter from Bruce D. Ryan, David D. Burns, Katherine L. Calderazzi, Paul Hastings, Janofsky & Walker LLP, to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, FCC (Dec. 5, 2001) (“Cumulus Letter”); Letter from James L. Winston, Walter E. Diercks, Paul M. Breakman, Rubin, Winston, Diercks, Harris & Cooke, LLP, to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, FCC (Dec. 17, 2001) (“T&W Communications Letter”). Cumulus also filed a letter dated January 16, 2002, purporting to respond to T&W Communications Letter, and T&W Communications filed a letter dated January 24, 2002, purporting to respond to Cumulus’s January 16, 2002, letter. We have considered both letters in making our decision.

¹⁶ 47 U.S.C. § 310(d).

¹⁷ See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

the proposed transaction based on publicly available information and information in the Commission's records.¹⁸

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.¹⁹

13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition"²⁰ in the advertising market, our focus is different.²¹ Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public air waves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."²² These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service, available to everyone and promoting locally oriented service and diversity in media voices.²³ Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services

¹⁸ *Id.* at 19895-96 ¶ 86.

¹⁹ *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

²⁰ 15 U.S.C. § 18.

²¹ Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. See *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). See also *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

²² See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion & Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*WorldCom-MCI Order*").

²³ For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

or responsiveness to the local needs of the community,²⁴ and whether it will result in the provision of new or additional services to listeners.²⁵

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.²⁶ A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.²⁷ Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50% of the stations in such a market.²⁸

16. We find that Cumulus's proposed acquisition of the seven stations is consistent with the numerical limits in our radio local ownership rules.²⁹ Cumulus' multiple ownership showing indicates that using the Commission's current definition of "radio market," the transaction creates three radio markets.³⁰ Market 1 is composed of 10 radio stations, and markets 2 and 3 are each composed of 15 radio stations. In market 1, a single licensee may, therefore, own up to 5 stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own more than 50% of the stations in the market. In markets 2 and 3, a single licensee may, therefore, own up to 6 stations, not more than 4 of which are in the same service (AM or FM). If the proposed transaction is approved and consummated, Cumulus will own in market 1, 5 stations (2 AM/3 FM); in market 2, 5 stations (1 AM/4 FM); and in market 3, 5 stations (1 AM/4 FM). The transaction therefore complies with the multiple ownership rules.

C. Public Interest Analysis Under Interim Policy

17. In the interim policy, we stated that, consistent with precedent, we will continue to examine

²⁴ See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

²⁵ See, e.g., *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

²⁶ 47 C.F.R. § 73.3555(a).

²⁷ *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

²⁸ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), §202(b)(1); 47 C.F.R. § 73.3555(a)(1).

²⁹ 47 C.F.R. § 73.3555.

³⁰ See *Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000) ("Radio Markets").

the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

18. *Product Market.* In the *Local Radio Ownership NPRM*, we stated that we would presume that the relevant product market is radio advertising.³¹ Cumulus disagrees, stating that available data show that radio stations face substantial competition from other advertising outlets.³² It states that a recent study shows that radio advertising is only part of the advertising campaigns of local merchants in Columbus-Starkville.³³ Cumulus attaches the affidavit of Dr. Stephen Stockum, an economist, who explains that this study shows that in some sectors (Casual Dining, Fast Food, Financial and Gaming), some advertisers use no radio advertising, while others spend 100% of their budgets on radio.³⁴ Stockum states that this fact shows that radio advertising is not critical to any advertisers in these markets.³⁵ He also states that the evidence shows that many advertisers alter their mix of advertising over time.³⁶ He concludes from these facts that radio advertising is not a distinct market.³⁷

19. T&W Communications disagrees, stating that the Commission is correct in presuming that radio advertising is a separate product market.³⁸ It notes that radio advertising has several unique advantages, among them that radio is only sound-based and is portable, allowing it to reach people while they do other activities, for example, drive their cars. T&W Communications states that radio advertising narrowly focuses on demographic groups that are attractive to advertisers; that it is inexpensive enough to allow advertisers to repeat ads frequently; that the cost of producing a radio commercial is much lower than that of producing a television commercial; and that radio advertising allows for quick turnaround of advertising copy.³⁹ T&W Communications attaches the sworn declaration of its General Manager, Terry Fulton, who states that based on his 23 years of experience in radio advertising, radio stations compete against each other in the Columbus-Starkville market and do not compete with other media to any significant degree.⁴⁰

20. In determining whether radio is a distinct product market, the question to be answered, as Cumulus's expert recognizes,⁴¹ is whether a hypothetical monopolist owner of all of radio stations would find it profitable to raise their rates a small but significant amount.⁴² There is little question that, as Cumulus argues, some advertisers could and would switch in the face of a price increase, but that is true

³¹ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895-96 ¶ 86.

³² Cumulus Letter at 6.

³³ *Id.*

³⁴ Cumulus Letter, Attachment B - Affidavit of Dr. Stephen Stockum ("Stockum Aff.") at ¶ 11.

³⁵ *Id.* at ¶ 12.

³⁶ *Id.* at ¶ 13.

³⁷ *Id.* at ¶¶ 6, 8.

³⁸ T&W Communications Letter at 6.

³⁹ *Id.*

⁴⁰ T&W Communications Letter, Declaration of Terry Fulton ("Fulton Decl.") at ¶ 4.

⁴¹ Stockum Aff. at ¶ 9.

⁴² See *Horizontal Merger Guidelines*, U.S. Dept. of Justice and Federal Trade Comm'n. § 1.12 (1992, revised 1997).

in the case of every market, even monopolized ones. The question is whether such a price increase would earn the radio stations additional profit, or whether so many advertisers would switch to other media that the radio stations would earn less profit. Where the monopolist is able to charge different prices to different buyers (termed price discrimination), the fact that it might be able to profitably increase its rates to some buyers, even if not all, must be taken into account.⁴³

21. We conclude that Cumulus has not shown that there is a material question in this case as to whether radio advertising in Columbus-Starkville is a distinct market. Stockum does not attach the advertising study on which he relies, but merely reproduces its results in his own table. And while the evidence supplied by Stockum does establish that some advertisers vary their advertising budgets among various media over time, the specific sectors he identifies (fast food, casual dining, financial services, and gaming) may not represent the average radio advertising customer. Moreover, the fact that some national or regional advertisers cited in the study (e.g., Taco Bell, Trustmark National) over time change their radio advertising as a percentage of their Columbus-Starkville advertising budget is not evidence that their switching among advertising media is the result of changes in relative prices among those media. First, this fact does not answer the question whether radio advertising and other media advertising are substitutes or complements. It is likely that advertisers desire a mix of media. Second, as we discussed above, the Department of Justice/FTC Merger Guidelines on which Stockum is basing his analysis⁴⁴ state that in markets where firms can charge different rates to different buyers, which is the case with radio, the agencies will examine markets consisting of those users who cannot easily switch to other products. Because radio stations can charge different advertisers different prices, the fact that prices may not increase for those radio advertisers that consider other media to be good substitutes does not mean that they will not increase for those advertisers who do not have other alternatives. It therefore does not show that radio advertising is not a separate product market. We conclude that, based on the evidence in the record, Cumulus has failed to rebut the presumption in our interim policy that radio advertising is a separate product market.

22. *Geographic Market Definition and Market Participants.* In the *Local Radio Ownership NPRM*, we stated that we would presume that the relevant geographic market was the Arbitron metro area, and that the market participants were the radio stations in that market. Cumulus first argues that the geographic market “may be” as broad as the Arbitron “Total Service Area”, which covers 12 counties.⁴⁵ T&W Communications argues that the very size of the Total Service Area indicates that it is not the relevant geographic market, stating that the Total Service Area covers 6745 square miles, an area almost as large as the states of Connecticut and Delaware combined.⁴⁶ T&W Communications further states that both in Cumulus’s SEC filings and on its website, Cumulus identifies the stations at issue here as located in the Columbus-Starkville area, not in some larger Total Service Area.⁴⁷ T&W Communications also states that in the experience of its station manager, the relevant area in which radio stations compete for advertising is Columbus-Starkville.⁴⁸ We agree that Cumulus has failed to show that the Total Service Area is the relevant geographic area for purposes of our competition analysis.

23. Cumulus next argues that from an antitrust perspective, the geographic market likely includes not only Columbus-Starkville, but also the areas encompassed by the Tupelo and Tuscaloosa Arbitron

⁴³ *Id.*

⁴⁴ Stockum Aff. at ¶ 8.

⁴⁵ Cumulus Letter at 6-7.

⁴⁶ T&W Communications Letter at 7-8.

⁴⁷ *Id.*

⁴⁸ *Id.*

metros.⁴⁹ Cumulus notes that stations from Tupelo and Tuscaloosa reach into the Columbus-Starkville area, and that these stations account for 41.5% of the radio listening audience in Columbus-Starkville.⁵⁰ Cumulus also states that advertisers in Columbus-Starkville routinely purchase radio spots on Tupelo and Tuscaloosa stations.⁵¹ It argues that at least several of the stations listed by Arbitron as “out of market” should be included as market participants, specifically WSMS(FM), WZBQ(FM), WSYE(FM), WTXT(FM) and WWMS(FM).⁵² Cumulus submitted a BIA report⁵³ showing that each of these stations earned revenues in the Columbus-Starkville metro. T&W Communications agrees, based on the experience of its General Manager, that two “out of market” stations should be included as market participants – WSMS(FM) and WZBQ(FM) – but disagrees that the three others should.⁵⁴

24. We conclude that Cumulus has failed to show that the Columbus-Starkville Arbitron metro is not the appropriate geographic market for our purposes. Cumulus has presented no evidence that advertisers consider listeners in Tupelo and Tuscaloosa as substitutes for listeners in Columbus-Starkville; that they would just as happily reach a Tuscaloosa listener as a Columbus one. Rather, Cumulus has presented evidence that radio stations other than those located in the Columbus-Starkville area reach Columbus-Starkville listeners. We discuss that evidence below. Further, one basis of our presumption that the Arbitron metro correctly identifies the market is that the professional radio trade services (Arbitron and BIA) treat it as a distinct economic unit, and radio stations use their Arbitron ratings to sell advertising. Cumulus has failed to show that this is not the case in Columbus-Starkville.

25. Arbitron and BIA identify the Columbus-Starkville metro as being “home” to 14 commercial stations. There is no dispute that the relevant market participants include these stations (the “above-the-line” stations). Arbitron and BIA also identify nine other commercial stations as receiving some share of the Columbus-Starkville listening audience. Cumulus argues that at least five should be considered market participants. Of these, the parties agree that WSMS(FM), which Cumulus seeks to buy, and WZBQ(FM) are both market participants.⁵⁵ We conclude, however, that Cumulus has failed to show that WTXT(FM) is a market participant. WTXT(FM) is located squarely in the Tuscaloosa, Alabama metro, and its 60 dBu contour covers only a small part of the Columbus-Starkville metro.⁵⁶ It has only a 1.4% audience share in Columbus-Starkville, and according to Cumulus’s own evidence is not among the top 12 stations for any demographic group.⁵⁷ According to the BIA estimate provided by Cumulus, WTXT(FM) earns \$150,000 from Columbus-Starkville advertisers, or approximately 7% of its estimated \$2.2 million in total revenues. Moreover, Tuscaloosa is the 57th largest market in the nation, while Columbus-Starkville is number 257. It is therefore doubtful that the advertising on WTXT(FM)

⁴⁹ Cumulus Letter at 6-7.

⁵⁰ Stockum Aff. at ¶ 17.

⁵¹ *Id.* at ¶ 21.

⁵² Cumulus Letter at 8.

⁵³ BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

⁵⁴ T&W Communications Letter at 9.

⁵⁵ WSMS(FM) was originally listed in the Columbus-Starkville metro before Cumulus asked it to be moved to the Arbitron Tupelo metro; it is the highest rated station in the Columbus-Starkville metro; WSMS(FM)’s community of license is Artesia, Mississippi, a town approximately 10 miles south of Columbus, while Tupelo lies approximately 60 miles north of Columbus; and the 60 dBu contour for WSMS(FM) is approximately coextensive with the geography of the Columbus-Starkville Arbitron metro.

⁵⁶ *Id.*

⁵⁷ See Cumulus Letter at Stockum Affidavit, Attachment 9.

attributed by BIA to Columbus-Starkville was seeking to reach the small Columbus-Starkville audience rather than the broader Tuscaloosa audience. Finally, T&W Communications' General Sales Manager states that based on his experience, WTX(FM) does not compete in the market, whereas Cumulus's economic expert states only that numerous out-of-market stations compete. Based on the record evidence, we cannot conclude that Cumulus has provided sufficient evidence that Columbus-Starkville businesses see WTX(FM) as a viable alternative to reach Columbus-Starkville listeners. We reach a similar conclusion with respect to WWMS(FM). The 60 dBu contour for WWMS(FM) reaches only a small portion of the Columbus-Starkville area, and WWMS(FM) has an 0.7 rating and an estimated \$30,000 of advertising revenue in the Columbus-Starkville market, or less than 4% of its total revenues. We find that Cumulus has not provided sufficient evidence to show that WWMS(FM) is a participant in the market for advertising to Columbus-Starkville listeners.

26. The evidence is much stronger with respect to the last out-of-market station identified by Cumulus as a market participant, WSYE(FM). Although Arbitron assigns WSYE(FM) to the Tupelo, Mississippi metro, its address is located in Houston, Mississippi, which is closer to West Point than it is to Tupelo. Further, WSYE(FM)'s 60 dBu contour covers the entire Columbus-Starkville metro (indeed, better than it covers the Tupelo metro).⁵⁸ WSYE(FM) also received a 4.3 audience share in the Columbus-Starkville metro, approximately the median rating for the Columbus-Starkville in-market stations. The BIA estimate provided by Cumulus shows that WSYE(FM) earned approximately \$400,000 from Columbus-Starkville advertisers, which is 40% of its total revenues according to BIA's estimate for the year 2000. Again, however, T&W Communications General Sales manager, based on his experience and knowledge of the market, does not agree that WSYE(FM) is a market participant. On the other hand, T&W Communications does not provide any other evidence or any explanation of why WSYE(FM) is not viewed by Columbus-Starkville advertisers as an alternative to the other market participants. Because, as discussed fully below, we conclude that even if WSYE(FM) is not a market participant, granting the above-captioned applications serves the public interest, we need not resolve this issue.

27. *Market Shares.* Cumulus and T&W Communications differ greatly regarding the revenues earned by the market participants, and hence the share of the revenues Cumulus would control if the above-captioned applications were granted. The attachment to the staff letter to Cumulus and T&W Communications listed the year 2000 total revenues of the market participants as estimated by BIA. In response, Cumulus submitted a study performed by BIA (commissioned by Cumulus) which asserts that the stations Cumulus seeks to purchase earned only \$1.9 million in revenues, rather than the \$2.2 million BIA originally estimated, or a decrease of approximately 15% overall (approximately 24% for Cumulus's "in-market" stations). At the same time, BIA's estimates of the revenues earned by the other stations in the Columbus-Starkville metro increased from \$1.3 million to \$1.65 million, an increase of approximately 27%. BIA attributes these changes to having "obtained updated information on the revenues earned by Cumulus stations (listed below) as well as updates on other stations in the market."⁵⁹ T&W Communications argues that Cumulus's downward adjustment of its revenues coupled with the upward adjustment of other stations' revenues "must be viewed with the greatest of skepticism."⁶⁰ T&W Communications also provides the statement of its General Sales manager that based on his knowledge and experience in the Columbus-Starkville market, the total radio advertising revenues for all stations are no more than \$2.3 million (rather than the just under \$2.9 million estimated by BIA), and are probably less.⁶¹

⁵⁸ See Cumulus Letter, Graham Brock, Inc. Attachment.

⁵⁹ See Cumulus Letter at 9-10 and Attachment A (BIA Analysis).

⁶⁰ T&W Communications Letter at 10.

⁶¹ T&W Communications Letter, Fulton Decl. at ¶ 6.

28. Although T&W Communications asks us to treat Cumulus's figures with skepticism, it does not directly dispute Cumulus's assertions for the revenues earned by the stations for which Cumulus has LMAs. We have no reason to disbelieve Cumulus's assertions about the revenues earned by the very stations for which it has LMAs. We therefore accept those figures as correct.⁶²

29. With respect to the revenues earned by the other stations in the market, BIA altered only two estimates – those for WFCA(FM) and WMSU(FM). BIA does not explain why these revenues estimates changed so dramatically from its original estimates -- WFCA(FM) from \$50,000 to \$200,000, a four-fold increase, and WMSU(FM) from \$300,000 to \$500,000, a 60% increase. We find BIA's unsupported explanation insufficient to cause us to alter its original estimates. Similarly, while T&W Communications' General Sales Manager states that he does not believe that the total revenues for the Columbus-Starkville stations are more than \$2.3 million (as compared to the original BIA estimate of \$2.9 million), he provides no support for that statement. On the other hand, the estimates for the non-Cumulus stations that T&W Communications submitted in its December 1998 Petition differ from the original BIA year 2000 estimates by only \$94,000, and are for two years earlier.⁶³ Thus, while the parties disagree about the revenues earned by each of the "in-market" stations, we find no substantial material issue regarding the revenues earned by them in total, which we estimate as between \$2.425 and \$2.52 million.

30. BIA's estimates for Cumulus states that WZBQ(FM), the out-of-market market participant not being purchased by Cumulus, earned \$400,000 from Columbus-Starkville advertisers. T&W Communications states that this figure should be no more than \$300,000. BIA also estimates that WSYE(FM) earned \$400,000 from Columbus-Starkville advertisers. While T&W Communications contends that WSYE(FM) is not a market participant, in its December 1998 Petition to Deny, T&W Communications estimated that WSYE(FM) earned \$300,000 in revenues. Finally, although BIA states that WSMS(FM) earned \$670,000 in revenues in the year 2000, Cumulus claims that only 70% of those revenues were from Columbus-Starkville advertisers.

31. Assuming, without deciding, that T&W Communications is correct with respect to its estimates of the revenues earned by those stations that Cumulus is not seeking to acquire, Cumulus would have between 51.3% and 52.9% of the Columbus-Starkville radio advertising market if we were to approve the assignments. If WSYE(FM) were considered a market participant, that percentage would drop to between 47% and 48.3%. These percentages are calculated according to estimates of revenues for the year 2000, and may be different if year 2001 figures were used. For example, Cumulus states that while WSMS(FM) earned 70% of its revenues from Columbus-Starkville advertisers in 2000, it earned only 60% in 2001, thereby possibly lowering its share of the Columbus-Starkville radio advertising market in 2001. We note that these revenue shares are comparable to those in other cases where we have found the transactions to be in the public interest.⁶⁴ Looking at the transaction from the point of market structure, Cumulus seeks to bring under common control the largest station group in the Columbus-Starkville market and what is at most the sixth largest group (the seventh largest if WYSE(FM) is considered a market participant). There will remain five other station groups in Columbus-Starkville that will compete for radio advertising. These market shares and market structure indicate that the transactions before us may carry some risk of anticompetitive harm, although, as discussed below, we find that the significant public interest benefits that arise from the transactions outweigh that risk.

⁶² We do note, however, that BIA's report was not made in accordance with our rules or the December letter to Cumulus and T&W Communications, nor does the sworn statement of Cumulus's Market Manager in support of Cumulus's filing include its own revenue figures.

⁶³ In its Petition, T&W Communications listed WSYE(FM) twice and did not list WKBB(FM).

⁶⁴ See, e.g., *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd at 19141-43 ¶¶ 12-15.

32. *Other Competitive Factors.* Cumulus states that the Commission has completed the auction for a new C3 FM radio station in State College, Mississippi, which will place a competitive signal over a large portion of the Columbus-Starkville metro.⁶⁵ T&W Communications states that the construction permit has not yet been granted, and there is no way of knowing when the station will be built.⁶⁶ We note that the 60 dBu contour of this station, as shown by Cumulus, will cover only a small part of the Columbus-Starkville metro. Cumulus also states that WKBB(FM) has applied to upgrade its license from Class A to Class C3, which would allow it with much wider coverage of the Columbus-Starkville metro.⁶⁷ T&W Communications responds that, again, the application has not been granted and there is no estimate of how long the upgrade would take.⁶⁸ Based on the record evidence, we find that a small amount of entry is possible in this market, thereby to some extent lessening any anticompetitive effects that might result from Cumulus's acquisition of the seven stations at issue.

33. T&W Communications asserts that Cumulus has a strategy of "overwhelming" small competitors and thereby making supracompetitive profits.⁶⁹ It also asserts that Cumulus is selling advertising on its stations in combination packages and is offering free spots on the station that competes with T&W Communications' station. T&W Communications asserts that Cumulus is attempting to "squeeze" other radio stations out of the market.⁷⁰ Cumulus, on the other hand, describes its ability to offer packages of advertising as a public interest benefit and a benefit for advertisers.⁷¹ It states that with common operation of the stations, it is able to offer advertising packages of sufficient scope to be a desirable alternative to newspaper or television advertising, at least for some advertisers, thus facilitating greater cross-media competition.⁷²

34. Absent additional evidence in the record, we decline to find that the mere fact of offering advertising in packages, or of offering advertisers discounts for buying spots on multiple stations, is anticompetitive.⁷³ Indeed, such practices may be efficient and procompetitive. As for Cumulus's statements to its shareholders that it seeks to enter midsize markets in order to earn higher than market returns, Cumulus explains in the very sentences quoted by T&W Communications that this is because many small programmers lack the capital to produce high quality locally-originated programming and employ more sophisticated research and marketing techniques, which Cumulus will be able to do. In short, Cumulus is claiming to be able to operate radio stations better than its competitors. Cumulus's superior ability to earn revenues, if it indeed has that ability, is not an anticompetitive harm that would warrant our denying these applications.

35. *Other Public Interest Factors.* Cumulus claims that common operation and control of the seven stations at issue will lead to a number of benefits for listeners. As stated above, Cumulus has operated these stations through LMAs for approximately three years.

36. Cumulus states that the LMAs have permitted numerous operational functions of the seven stations to be consolidated. As a result, there have been certain cost efficiencies that, in turn, have

⁶⁵ Cumulus Letter at 12-13.

⁶⁶ T&W Communications Letter at 15.

⁶⁷ Cumulus Letter at 12-13.

⁶⁸ T&W Communications Letter at 15.

⁶⁹ *Id.* at 13.

⁷⁰ *Id.* at 13-14.

⁷¹ Cumulus Letter at 13, 15.

⁷² *Id.* at 15.

⁷³ For example, if advertisers were forced to buy advertising spots in packages, our analysis might be different.

allowed the hiring and retention of a more professional programming and sales staff. Further, the stations now share one major production studio and one common satellite dish. Operations have been consolidated so that one newsperson provides news for all seven stations, and there is only one Operations Manager, one Business Manager, one Market Manager and one Sales Manager. Cumulus also states that certain administrative support responsibilities have been consolidated.⁷⁴

37. Cumulus states that there also have been several product improvements, which it claims were unlikely to be made without its combined operations. Cumulus states that these improvements include: the hiring of program directors for each of the FM stations, upgrading studio facilities, and purchasing additional studio equipment, several remote vehicles, and a remote sound system.⁷⁵

38. Cumulus states that the quality of the stations' programming has also improved. It states that prior to its involvement under the LMAs, many of the stations were moving towards automation, but that they now carry a substantial amount of local programming across the board. For example, WSMS(FM) had been receiving its programming from a satellite feed from Dallas, Texas; it now has a locally produced format that Cumulus contends provides "quality local programming." WSSO(AM) and WJWF(AM) had been broadcasting syndicated national sports programming that Cumulus asserts garnered little interest, noting that Mississippi has no national sports teams. The stations now have a talk/news format with a significant amount of local programming including a local talk show. Cumulus asserts that these two stations are becoming forums for community events and concerns. Finally, Cumulus asserts that the LMAs have permitted virtually all of the key programming of WSMS(FM) and WMXU(FM) to be locally generated, with the exception of the morning shows.⁷⁶

39. Cumulus concludes that bringing the stations under common operation has benefited and will benefit local listeners by providing them with improved programming, specifically targeted to the region's interests and tastes. It states that listeners have benefited from what it terms as the "dramatic increase" in locally originated programming. Cumulus also asserts that advertisers have benefited from the ability to purchase advertising in packages.⁷⁷

40. T&W Communications does not dispute that the benefits listed by Cumulus have occurred. Rather, it states that Cumulus has been able to achieve virtually all of them through its LMAs, and therefore the efficiencies and benefits are not "merger-specific", *i.e.*, they would not be caused by bringing the stations under common control. It therefore concludes that there are no public interest benefits that would result from granting the applications.⁷⁸ We disagree. We do not believe that the claimed efficiencies and public interest benefits should be ignored simply because Cumulus was able to achieve them through its LMAs. Just as we consider the harms to competition that might result from common control, even though the stations have already been operated jointly, we must consider the benefits. Otherwise, we would never review either the harms or benefits of a transaction that was associated with an LMA. We find that particularly inappropriate since in most cases, the applicants operate stations under LMAs only while they await our review of the transaction. We find that based on the record before us, the benefits cited by Cumulus are real and substantial. Moreover, they are not speculative, but have already occurred. In particular, as a result of Cumulus's operation of these stations, listeners in the Columbus-Starkville area have and will receive substantially improved programming, programming that is geared to local interests and local concerns.

⁷⁴ Cumulus Letter at 13-14.

⁷⁵ *Id.* at 13-15.

⁷⁶ *Id.* at 14-15.

⁷⁷ *Id.* at 15.

⁷⁸ T&W Communications Letter at 15.

41. Alternatively, T&W Communications alleges that there has been an illegal transfer of control of the seven stations to Cumulus pursuant to the LMAs.⁷⁹ T&W Communications claims that the operational efficiencies claimed by Cumulus in response to the Inquiry Letter provide strong support for this charge. Cumulus's statement, T&W Communications claims, "falls just short of explicitly conceding that it has engaged, and continues to engage in, an unauthorized transfer of control of the subject stations."⁸⁰

42. The facts alleged by T&W Communications do not establish a *prima facie* case that Cumulus and the licensees of these stations have engaged in an unauthorized transfer of control. Under the Commission's rules and policies, parties may enter into LMAs while assignment applications are pending. It is well established that an LMA itself does not constitute a transfer of control unless the agreement vests a disproportionate degree of control in the broker of the stations.⁸¹ Here, we do not find that control of the stations was ceded from the licensees to Cumulus.

43. Under Section 310(d) of the Communications Act, and Section 73.3540 of the Commission's rules, no broadcast authorization may be transferred without the Commission's prior consent. In determining whether a premature transfer of control has occurred, we traditionally look beyond the legal title to see whether a new entity or individual has obtained the right to determine the basic operating policies of the stations.⁸² Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable.⁸³

44. The subject LMAs contain express retention by the licensees of ultimate authority over programming, finances, and personnel, as our cases require.⁸⁴ The licensees are each required to employ a general manager and at least one full-time employee to assist the general manager, neither of whom may have an employment, consulting, or other material relationship with Cumulus.⁸⁵ The licensees also have explicit responsibility to "ascertain[] community problems, needs and interests; broadcast programming responsive thereto; and timely prepare and place in the Station's public inspection files appropriate documentation thereof[.]"⁸⁶ The LMAs also state that during the term of the agreements, Cumulus will reimburse the licensees for expenses incurred. We have found previously that such arrangements are consistent with the Commission's rules and do not constitute an unauthorized transfer of control.⁸⁷ Thus,

⁷⁹ Cumulus submitted copies of the LMAs with the assignment applications for the following stations: (1) WSMS(FM); (2) WSSO(AM), WMXU(FM), and WKOR-FM; and (3) WKOR(AM) ("Columbus/Starkville LMAs"). Cumulus apparently did not submit a copy of the LMA for stations WJWF(AM) and WMBC(FM).

⁸⁰ T&W Communications Letter at 4.

⁸¹ *American Music Radio*, 10 FCC Rcd 6387, 6402 (1992).

⁸² See *WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

⁸³ See *North Texas Radio, Inc.*, 11 FCC Rcd 8531 (1996); see also *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

⁸⁴ Each of the LMAs specifically require the licensees to "retain ultimate control over the personnel, finances, programming and operations of the Station[.]" Columbus/Starkville LMAs at ¶ 3(c). In addition, the LMAs provide that the "Licensee will have full authority, power and control over the operation of the Station and over all persons employed by it. Licensee will bear the responsibility for the Station's compliance with, and shall cause the Station to comply with, all applicable laws, including FCC Requirements." *Id.* at ¶ 5.1.

⁸⁵ *Id.* at ¶ 3(a)-(d). See *Roy R. Russo*, 5 FCC Rcd 7586, 7587 (1990).

⁸⁶ Columbus/Starkville LMAs at ¶ 3(e).

⁸⁷ See, e.g., *WGPR, Inc.*, 10 FCC Rcd 8140, 8145 (1995) (citing *Roy R. Russo*, 5 FCC Rcd at 7587).

given that T&W Communications has failed to allege or present any evidence to the contrary, we find that the LMAs contain provisions that guarantee the licensees' retention of ultimate control over programming, personnel, and finances. In sum, there is no evidence to suggest that the LMAs, either in form or practice, violate the Commission's existing rules and practices or result in Cumulus exercising *de facto* control over these stations.

D. Conclusion

45. We find that the record here demonstrates that there are significant benefits to listeners that will result from common operation of the stations. In particular, common operation has led to significantly increased locally-selected and locally-generated programming. Moreover, Cumulus's ability to create advertising packages that reach several demographic groups may provide advertisers with an alternative to newspaper, television or cable advertising, thus increasing cross-media competition. We find no substantial and material questions of fact as to the effect of the proposed transaction on economic competition and on the listening audience that would warrant further inquiry. We conclude that the benefits to the listening public outweigh the risk of harms to the listening public that might result from common control. In addition, we have reviewed the above-captioned assignment applications and find that all of the applicants are fully qualified. We therefore find that granting the above-captioned applications will serve the public interest.

IV. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED that the applications to assign the licenses of stations WKOR(FM), Columbus, Mississippi, WMXU(FM), WSSO(AM), Starkville, Mississippi, WKOR(AM), Starkville, Mississippi, WSMS(FM), Artesia, Mississippi, WJWF(AM), Columbus, Mississippi, and WMBC(FM), Columbus, Mississippi, to Cumulus Licensing Corporation ARE GRANTED; and

47. IT IS FURTHER ORDERED that the Petition to Deny the assignment of stations WKOR(FM), Columbus, Mississippi, WMXU(FM), WSSO(AM), Starkville, Mississippi, WKOR(AM), Starkville, Mississippi, WSMS(FM), Artesia, Mississippi, to Cumulus Licensing Corporation, and the Petition Deny the assignment of stations WJWF(AM), Columbus, Mississippi, and WMBC(FM), Columbus, Mississippi, to Cumulus Licensing Corporation, filed by T&W Communications Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start “flagging” certain cases. Despite the Commission’s attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem, and “to undertake a comprehensive examination of our rules and policies concerning local radio

ownership,” we adopted the *Local Radio Ownership NPRM*.⁸⁸ This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy, to provide greater transparency to the review process and to “guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding.”⁸⁹ Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission’s rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger “may be substantially to lessen competition,”⁹⁰ the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of “ensuring the existence of an efficient, nationwide radio communications service”⁹¹ and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the “in market” stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to “out of market stations.” Moreover, thirty “out of market stations” have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station’s performance through improved local news, weather and information.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other’s service areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for

⁸⁸ See, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

⁸⁹ *Id.* at 19894 (¶ 84).

⁹⁰ 15 U.S.C. § 18.

⁹¹ 47 U.S.C. § 151.

advertising. In Columbus, Georgia, we found that significant format and radio advertising competition from three large radio station groups, one new entrant, and one out-of-market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY

Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I support today's decisions granting four of the five oldest pending radio merger applications and setting one for hearing. I recognize that these cases have raised particularly difficult issues, but that is not a reason for failing to resolve them in a timely manner. I am pleased that, by today's decisions, we are finally able to provide answers to the applicants – some of whom have been waiting for years. Regardless of the outcome, the Commission owes it to consumers and the industry to provide prompt and clear answers to regulatory questions. I look forward to working with my colleagues to resolve the other pending radio applications and the outstanding Notice of Proposed Rulemaking.

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS
ON RADIO TRANSFER APPLICATIONS**

*In the Matter of Golden Triangle Radio, Inc., Charisma Broadcasting Co.,
Bravo Communications, Inc., Radio Columbus and Cumulus Licensing Corp.
(Columbus, MS)*

*In the Matter of Solar Broadcasting Company,
Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses Inc.
(Columbus, GA)*

*In the Matter of Great Scott Broadcasting and Nassau Broadcasting
(Trenton, NJ)*

*In the Matter of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.
(Charlottesville, VA)*

*In the Matter of Gowdy FM 95 and Gowdy Family LP and Clear Channel Broadcasting
Licenses, Inc.
(Laramie, WY)*

I have struggled to find the public interest in the grant of these transfers. Given the levels of market concentration – both of advertising and audience share – that will result from these transactions, I can support the grant of only one of the five transfers at issue here. That one transaction arises in a unique geographic circumstance, in which the potential harm to competition was not significant and was outweighed by the benefits of the transaction. In the other four cases, however, I find evidence of significant anticompetitive effects. I could not support grant of these transfers absent additional information on the public interest benefits. I support the decision of the Commission to send one of these five transfers to hearing, and would have sent another three to hearing as well.

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Each transaction presents slightly different issues regarding the acceptable levels of concentration in a market, the definition of a local radio market, or the attribution of local marketing agreements for the purposes of competitive analysis. The one transaction I am able to support, albeit hesitantly, involves the transfer of the Gowdy stations in Laramie, Wyoming to Clear Channel Broadcasting, Inc. While I am tremendously concerned about the unprecedented

levels of market domination Clear Channel has achieved in radio markets throughout the country – including in Cheyenne, Wyoming – the transaction before the Commission does not appear to increase Clear Channel's dominance in this market. Due to the unique topography of the area, the Laramie stations deliver marginal signals into Cheyenne. This geographic anomaly permits the substitution of separate geographic markets for Cheyenne and Laramie, in lieu of the presumptive Arbitron market definition, thus I support the transfer of these licenses from the Gowdy licensees to Clear Channel.

Speaking generally, however, these transactions, taken together with the dozens of transactions approved by the Bureau last year, result in the Commission's adoption of an unacceptable standard for concentration in local radio markets. The amount of concentration in the markets at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.

As I have often stated, Congress directed us to look to the public interest as we review transactions. Congress told the Commission that it may grant a broadcast license transfer only if "the public interest, convenience and necessity will be served thereby."⁹² Competition is, and always has been, an essential part of the public interest, and I believe that a competitive analysis is an important part of the public interest in a particular transaction.⁹³

I don't think that my faith in competition is particularly radical. In fact, it is a cardinal principle underlying the 1996 Act. In these relatively small radio markets, the anticompetitive effects of such high levels of concentration are likely to be especially pronounced. When one or two owners wield this much power in a particular market, they can make it impossible for independent stations to survive or even compete.

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting – localism and diversity. This is consistent with Commission precedent, in which we have found that we have "an independent obligation to consider whether...radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest."⁹⁴

⁹² 47 U.S.C. § 310(d).

⁹³ See, e.g., *FCC v RCA Communications, Inc.*, 346 U.S. 86, 94 (1953)("There can be no doubt that competition is a relevant factor in weighing the public interest."); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950)("Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws."); *Rogers Radio Communications Services, Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978)(The "effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . .").

⁹⁴ *CHET-5 Broadcasting L.P.*, 14 FCC Rcd 13041, 13043 (1999).

Neither is this a radical position. As a market-based democratic society, we value independent voices in the media. For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members – not just a *variety* of formats, but *diversity* of formats and of ownership. As consolidation of market power makes it harder and harder for independent stations to compete, local markets lose the diversity so essential to the free exchange of ideas in their community.

No single factor necessarily defines whether a particular transaction is in the public interest. Nevertheless, when harm to competition is likely to result from the grant of an application, it behooves the Commission to assure itself with as much certainty as is possible, that despite the harm to competition, each transaction will nonetheless serve the public interest, convenience and necessity. In order to make this determination where such high concentration levels will result, without clear evidence of strong public interest benefits, as in four of the cases before us today and discussed below, I am convinced that we must further examine the issues at a hearing.

**SEPARATE STATEMENT
OF COMMISSIONER KEVIN J. MARTIN**

Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I – as well as everyone at the Commission – am concerned about the increasing levels of concentration of radio station ownership that has taken place during the last five years.

Last November, the Commission issued a NPRM undertaking a comprehensive review of how the Commission should assess radio license transfer applications. At that time, I expressed my dismay at the length of time many of these applications had been pending at the Commission. I am heartened that today, we are ruling on the five oldest applications (all pending for over 16 months).

All of the pending transfer applications comply with the structural ownership limits created by Congress in §202(b) of the 1996 Telecommunications Act. I continue to believe such structural limits should make our review of proposed mergers easier, not more complicated. I thus expressed my reluctance last November in agreeing to an interim policy that continued – and expanded upon – the practice of flagging particular transfers for a more detailed analysis, when they would be below the statutory ownership limit. Nevertheless, I voted for the NPRM because it fairly raised the issue of what our policy should be with respect to assessing radio transfers, and it included timing deadlines that would ensure timely action on the pending applications. Today's actions on the oldest applications are a direct result of those deadlines. I am extremely pleased that we finally are providing the parties with resolution.

Each of the applications listed above was subjected to a comprehensive competitive analysis as set forth in the interim guidelines. I agree with the majority of my colleagues that the factors weigh against granting Clear Channel's acquisition of Air Virginia's radio license in Charlottesville, VA. Based on the record before us, I am unable to conclude that this transfer would serve the public interest. I therefore vote to set this application for hearing.